No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,
v.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DONALD I. BAKER
(Counsel of Record)
ROBERT H. RAWSON, JR.
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3939

THOMAS E. KAUPER
University of Michigan Law School
Ann Arbor, Michigan 48109
(313) 764-9341

Attorneys for Amicus Curiae

Of Counsel:
WILLIAM E. BLASIER
General Counsel
QUENTIN RIEGEL
Assistant General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3847

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a per se rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a per se unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTE

In The
Supreme Court of the United States
October Term, 1982

No. 82-914

Monsanto Company,
Petitioner,
v.
Spray-Rite Service Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the National Association of Manufacturers in support of Petitioner. Consent from counsel for both parties has been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers ("NAM") is incorporated under the laws of the State of New York

as a non-profit voluntary business association representing approximately 13,000 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of these manufacturers use distributors to market their products. In addition, through its Associations Department and the National Industrial Council, NAM is affiliated with approximately 158,000 businesses, the vast majority of which are subject to the jurisdiction of the federal antitrust laws. As active participants in the free-market system of the United States, NAM's members have a vital interest that these laws be interpreted according to consistent and predictable standards and in ways which enhance business efficiency and consumer welfare.

STATEMENT

Petitioner Monsanto Company ("Monsanto") is a manufacturer of agricultural herbicides. Its herbicides are sprayed on agricultural land early in the growing season to prevent the growth of weeds, which reduce crop yields. If improperly applied, such herbicides can kill the crop along with the weeds.

Throughout the period at issue in this case, Monsanto distributed its agricultural herbicides through approximately 100 non-exclusive distributors which sold the products to retailers. Each distributor had a non-exclusive "primary responsibility" territory. Approximately 10-20 Monsanto distributors were assigned to each territory. Respondent Spray-Rite Service Corporation ("Spray-Rite") was one such distributor, competing with others in Illinois.

Monsanto suggested retail prices to its distributors, but its price recommendations were generally not followed by them, including Spray-Rite. "Price cutting was

a way of life with distributors" of these products, according to one of Respondent's witnesses. (Tr. 2234). Consequently, there was no evidence of price uniformity in the distribution of Monsanto herbicides.

In the late 1960's, Monsanto's market position in herbicides was marginal. For example, in 1968 it accounted for approximately 3% of the sale of herbicides used on *soybeans*, in competition with two manufacturers who each had over 30% of the market. (DX 501, JA 113, Tr. 3300). Monsanto accounted for 15% of sales of herbicides used on *corn*, but Geigy "dominated the market" with approximately 70% of sales. (Tr. 2881, 3303-04; DX 502, JA 114, Tr. 3300).

Dissatisfied with its market position, Monsanto in 1967-68 instituted a new marketing program stressing distributor service to agricultural retailers. The purpose of the program was to educate retail dealers and farmers on safe and efficient use of Monsanto herbicides, and to promote their use instead of competitors' herbicides. In accordance with this program, Monsanto sent out a letter to Respondent and other distributors "describ[ing] Monsanto's newly adopted criteria for evaluating distributor performance: (1) whether the distributor's primary activity was soliciting sales to herbicide dealers; (2) whether the distributor employed trained personnel capable of carrying out Monsanto's technical programs with dealers and farmers; and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility." *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226, 1232 (7th Cir. 1982), App. A-3 (footnote omitted). Meanwhile, Monsanto's new compensation programs included cash bonus payments to distributors for participating in Monsanto's technical schools and demonstrations. *Id.*

Monsanto's new competitive strategy apparently worked. Its share of corn herbicide sales increased from approximately 15% in 1968 to 28% in 1972—a gain largely achieved at the expense of Geigy, whose share fell from approximately 70% to 55% during the same period. (Tr. 3305; DX 502, JA 114, Tr. 3300). Monsanto's share of soybean herbicide sales increased from 3% to 19% between 1968 and 1972. (Tr. 3302; DX 501, JA 113, Tr. 3300). During this period total industry sales expanded substantially and Monsanto's suggested price declined; Respondent's expert characterized the herbicide industry as "highly competitive." (Tr. 2990).

Monsanto did not renew Spray-Rite's distribution contract in 1968. Spray-Rite, despite the fact that it was Monsanto's tenth largest distributor in the country by volume, was basically a one-man organization. Monsanto officials testified that they refused to renew Spray-Rite because it declined to hire an adequate sales and education staff to promote sales to local agricultural dealers, as contemplated by the 1967 program. (Tr. 2510-15, 3825-26). In any event, Spray-Rite's activities were overwhelmingly on behalf of Geigy, whose corn herbicide products accounted for approximately 80% of Spray-Rite's total herbicide sales by volume. (Tr. 936-42, 1074).

Some distributors had at various times complained to Monsanto about price cutting by other distributors, including Spray-Rite; and there is evidence of Monsanto's continuing concern that distributor margins be adequate to support promotional and educational programs. (Tr. 1572-74, 1640-43, 1653-58, 1679-81). However, the most recent complaint to Monsanto by any distributor about Spray-Rite's pricing was *15 months prior* to the nonrenewal. (Tr. 1390-401; PX 185, Tr. 1392, 1394-95).

On these facts, "[t]he district court instructed the jury that it should find Monsanto's conduct per se unlawful

if it found that Monsanto engaged in the alleged conduct in furtherance of a conspiracy to fix resale prices." 684 F.2d at 1233, App. A-4. The jury so found. The court of appeals affirmed.[1]

SUMMARY OF ARGUMENT

The central issue in this case involves the freedom of a manufacturer to terminate a distributor for legitimate business reasons, even though the termination chronologically follows a price-related distributor complaint. Elusive standards on this issue have made counselling and business planning uncertain, and litigation much more frequent. Moreover, inefficiencies in the allocation of economic resources have been the inevitable result.

In the opinion below, the Seventh Circuit ignored the fundamental reality of distributor relationships, recognized by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In truth, a manufacturer and its distributors are essentially joint venturers in marketing the manufacturer's product. Success of their common enterprise necessarily requires communication about the joint marketing program, which may include discussion of non-performance by a competing distributor to the detriment of the overall program. Such continuing communication is entirely consistent with the legitimate marketing goals of the manufacturer and is not properly the subject of a rule of per se illegality. A terminated "free rider" should not be entitled to get to a jury simply because a price-related complaint preceded termination. Rather, the proper inquiry for the judge concerns the state of interbrand competition, the manufacturer's sales and service program, and the legitimacy of the manufacturer's concern about non-performance by the distributor.

---

[1] Monsanto was also found to have engaged in a post-termination boycott of Spray-Rite. 684 F.2d at 1235-36, App. A-9 - A-11. Monsanto has not sought certiorari on this issue and we express no view on it.

ARGUMENT

I. MANUFACTURERS REQUIRE A CLEAR AND CONSISTENTLY APPLIED LEGAL RULE TO DEAL WITH THE RECURRING SITUATION TYPIFIED BY THIS CASE.

Effective distribution is often crucial to a manufacturer's success in competitive product markets. Particularly if a product is complex, potentially harmful, new, or generally unknown, the manufacturer has obvious reasons to encourage his distributors and dealers to explain and promote its product vis-a-vis those of its competitors. An effective effort requires continuous communication between the manufacturer and its individual distributors and dealers.

Where a particular distributor fails to carry out the education-promotion activities contemplated by the manufacturer, his non-performance can bring about "the so-called 'free rider' effect" discussed by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). The distributors who provide the service are placed at a cost disadvantage vis-a-vis the distributor who does not, and the non-complying distributor can reduce prices accordingly.[2] As a result, promotional and educa-

---

[2] The Sixth Circuit very clearly explained the issue in Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195 n.8 (6th Cir. 1982):

> The "free rider" problem arises where pre-sale, point-of-sale or post-sale services are offered by the manufacturer's authorized distributors and dealers. Discounters are tempted by market forces to obtain and retail the same product without offering such services. Because the discounter does not incur the cost of providing services, it is able to offer the "raw" product at lower prices. Further, consumers are able to obtain and take advantage of the services provided by the authorized distributors and dealers while ultimately purchasing from the discounter. Finally, the authorized distributors and dealers are thereby required to offer services by the manufacturer without obtaining the benefit of retail sales.

tional "services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id.* This problem, which can apply equally at the distributor level, is particularly acute where (as in Monsanto's case) distributors are not given exclusive territories.

This "free rider" problem is obviously of great concern both to a manufacturer *and* its distributors. Not surprisingly, it is frequently an aspect of the ongoing discussions between them. When a distributor cuts prices sharply, a competing distributor is likely to complain to the manufacturer. A manufacturer has no control over such complaints, although the manufacturer who assumes greater responsibility for distributor planning is more likely to receive such complaints in the normal course of business.

Since substantial price cutting is likely to be indicative of failure to provide sales and educational services, such a distributor complaint is likely to trigger an analysis by the manufacturer. Sometimes a manufacturer will find that the price-cutting distributor is simply not doing what he contracted to do. If so, the manufacturer has a legitimate interest in terminating such a distributor. Yet exercise of that legitimate interest may be risky. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)—a case relied upon by the Seventh Circuit in *Monsanto*, 684 F.2d at 1238-39, App. A-15—illustrates the point very clearly. In that case, the defendant manufacturer had appointed the plaintiff as a distributor to develop sales for its rustproofing products in the *marine* field. 673 F.2d at 986. Thereafter, a distributor complained that the plaintiff was cutting prices on sales in the *automotive* sales field. The manufacturer found that the plaintiff had not developed the marine uses at all, and terminated the plaintiff. Yet on this evidence, the Eighth Circuit held that plaintiff was

entitled to get to the jury on its per se theory that the manufacturer was engaged in vertical price-fixing.[3]

The dilemma created in this area is intensely practical. The manufacturer in the *Monsanto* or *Lubrizol* situation simply does not know what he can do after receiving a price-related complaint. Can he investigate the circumstances? Can he terminate a distributor who is not performing his distribution contract? Or must he continue the non-performing distributor indefinitely, simply because of another distributor's concern about the latter's pricing? Counsel must advise him that there is substantial risk of his being sued in such a complaint-and-termination case; and that treble damage liability may well turn on whether a jury believes that the manufacturer (1) "conspired" with the complaining dealer (or dealers) and (2) sought to "fix" or "stabilize" prices in the resale market. Counsel must also advise that a jury may view a single, solitary "complaint" as a "request" to terminate, and may also infer from evidence solely of the complaining *distributor's* concern about prices an "agreement" by the manufacturer to "fix prices."[4] The busi-

[3] 673 F.2d at 991-92. This was despite the District Court's finding that the evidence was undisputed that defendant "Lubrizol never discussed with plaintiffs the price at which they should resell" the product, 513 F. Supp. 995, 999 (E.D. Mo. 1981). On the same day, another panel of the Eighth Circuit reached the opposite result on similar facts. Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982) (directed verdict for the defendant who had recommended prices). Similar, but less direct, conflicts exist within other circuits. *Compare, e.g.*, Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), *with* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-70 (3d Cir. 1979). The conflicts between circuits are equally pronounced. *See* Schwimmer v. Sony Corp., 103 S. Ct. 362 (1982) (White, J., dissenting) (*cert. denied*).

[4] Counsel might well point to the Third Circuit's summation of the situation in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 170 (3d Cir. 1979): "Given the *alleged* anticompetitive and *arguably* horizontal impact of United's decision, and given the

nessman (who may have served as a juror) knows that juror responses to generalized jury inquiries of the type used in *Monsanto* are essentially unpredictable, and hence verdicts are likely to turn on subjective impression. He also knows that even if he persuades the jury to his point of view, he is still going to have to pay counsel substantial fees for defending him. The net result may often be to immunize inefficient distributors from termination.

This complaint-and-termination quandary can be solved only if this Court articulates (1) a clear legal standard to determine when a case is to be submitted to the jury and (2) a more structured jury inquiry when it is. The task is difficult but very important. Only in this way can legal counselling rise above learned speculation, and business planning proceed with some acceptable level of predictability.

II. DEALER COMPLAINTS ABOUT ANOTHER DEALER'S PRICING DO NOT CONVERT A DEALER TERMINATION CASE INTO A PER SE PRICE-FIXING CASE.

The root error in the Seventh Circuit's opinion was its holding that "[p]roof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." 684 F.2d at 1239, App. A-15. This proposition (for which the Seventh Circuit relied on *Battle v. Lubrizol*, 673 F.2d at 984) ob-

---

price orientation **of the alleged conspiracy, we cannot say that a *per se* violation of the Act *may* not be shown. If Cernuto can prove at trial that United, Lappin and Famous [the alleged conspiring distributor] conspired to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a *price related end,* then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving kitchen cabinet sales in Western Pennsylvania." (Emphasis added).**

scures a key question of causation. What do "in response to" and "concerted action" mean? Is every termination decision which follows a price complaint "in response to" and hence "concerted," even if it was "primarily" based on non-performance of distributorship contract obligations? *Cf. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 109 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Is the test met if the manufacturer would not have learned of the distributor's non-performance of sales obligations but for the price-related complaint? *Cf. Battle v. Lubrizol*, 673 F.2d at 984. As applied by the Seventh Circuit panel here, it apparently means that every such price complaint-and-termination case goes to the jury as a potential per se "conspiracy." This exposes a manufacturer to all the risks of a trial in which the plaintiff could recover treble damages without proof of market effect (or even *with* proof of pro-competitive effects), if there is evidence that "the termination is motivated by a desire to reduce or eliminate the price competition for the manufacturer's products." 684 F.2d at 1234, App. A-6.

Because the standard is unclear, the decisions in the various circuits are conflicting, or at least confusing in their practical application. *Compare Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978), *and Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d at 105, *with Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979). We submit that inference of a price-fixing conspiracy cannot responsibly be drawn absent some evidence that price was the principal *cause* of action taken by a manufacturer subsequent to distributor complaints. Otherwise, temporal coincidence alone could be enough to get to the jury. *Cf. Battle v. Lubrizol*, 673 F.2d at 984.

The Seventh Circuit's approach ignores the real marketing relationships between a manufacturer and distributor recognized by this Court in *GTE Sylvania*. A manu-

facturer and its distributors are engaged in what is essentially a joint venture to market the manufacturer's products in competition with those of its competing manufacturers. Communications among the partners, as among horizontal joint venturers, are important to the success of the common enterprise. To say that a particular communication "is sufficient to raise an inference of concerted action," even though it is entirely consistent with the manufacturer's unilateral interest in a legitimate marketing program, is a most distorted use of the conspiracy concept. The Sherman Act proscribes a "conspiracy, *in restraint of trade*" (15 U.S.C. § 1, emphasis added), not conversations among legitimate partners.

Part of the problem is that conspiracy concepts developed in the horizontal competitor context are difficult to apply in the manufacturer-dealer context. Random discussions among direct competitors are often suspect. *See* A. Smith, *The Wealth of Nations, cited in United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980). The question of whether chance contacts among competitors become a "conspiracy" depends on whether the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of minds." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

In the manufacturer-distributor context, the parties plainly have "a unity of purpose or a common design" to develop an effective merchandising program. This is entirely legitimate. Non-performance of key duties of such a program by any participant is necessarily of concern to others. Pricing is part of the picture, because "free riding" by a non-performing distributor often involves price cutting. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982). Hence the inquiry cannot be simply whether the parties in the joint distribution undertaking (the manufacturer and its distributors) communicated, were engaged in the common undertaking, and

were concerned about price—but whether the actions taken were consistent with the legitimate goals of the manufacturer in establishing the joint program.[5] Only when communication *and* any resulting action are shown to be inconsistent with such legitimate goals is there evidence "sufficient to raise an inference of concerted action" and hence go to the jury on a per se theory.[6]

It is clearly inappropriate to apply the per se label to such complaint-and-termination evidence, which is often economically ambiguous, without regard to the relationship of the communication and conduct to the manufacturer's legitimate goals. As this Court stressed in *GTE Sylvania*, "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticom-

---

[5] The Seventh Circuit explained the problem very clearly in Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 744 (7th Cir. 1982) (per Posner, J.):

> If a supplier wants his distributors to emphasize non-price . . . competition . . ., he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services and other forms of non-price competition, and of course the undersold distributors will be equally or more hostile. The motive of suppliers and distributors alike could thus be described as wanting to eliminate price cutters yet there would be no per se illegality so long as the supplier was not just knuckling under to the distributors' desire for less competition. . . . It is enough [to avoid the inference of conspiracy] that in this case the plaintiff did not prove an improper motive by the supplier.

[6] NAM seeks to deal with this case from the perspective of the practical problem now faced by manufacturers who want to use distribution systems. Accordingly, it assumes the existence of this Court's precedents holding that vertical price-fixing is per se illegal in some circumstances. We do not reach the broad and important point, raised by the Solicitor General in his amicus brief supporting certiorari, whether it is ever appropriate, in light of the policy announced in *GTE Sylvania*, to impose a per se rule in a vertical pricing case.

petitive." 433 U.S. at 49-50, discussing the standard formulation in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Even in the horizontal competitor context, the Court has stated recently that the inquiry is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). It is very hard to say that communications between a manufacturer and its distributor about the implementation of a bona fide joint marketing program—or the nonimplementation of the marketing program by the competing distributor—are "manifestly anticompetitive" or "always or almost always tend to restrict competition and decrease output." This is especially so where (as in *Monsanto* and *GTE Sylvania*) the marketing program was instituted by a manufacturer with a small market share and it proved successful in enhancing its competitive position.

In sum, when a per se concept is applied to economically ambiguous evidence, as here, the plaintiff can get a "free ride" to the jury and recover treble damages without any showing that (i) competition was injured, or (ii) the manufacturer's program lacked a legitimate business justification. That produces results directly in conflict with *GTE Sylvania*.

III. THE LEGAL STANDARD SHOULD EMPHASIZE THE MANUFACTURER'S LEGITIMATE INTERESTS IN INTERBRAND COMPETITION AND EFFECTIVE SALES EFFORTS.

Concern about compliance with the service aspects of a manufacturer-distributor arrangement is entirely legitimate and cannot properly be viewed as simply an adjunct to vertical price-fixing. Yet performance of legitimate distribution services and resale price cannot be en-

tirely separated. Rather, as we have suggested, a pattern of heavy discounting is frequently (although not always) symptomatic of a distributor's failure to carry out his sales or service obligations. Therefore, distributor complaints about another distributor's prices are sometimes followed by termination for reasons firmly grounded in the distributor's failure to honor his service obligations. Correlation is not causation.

Accordingly, this Court should specifically mandate structured judicial inquiry to govern the recurring complaint-and-termination case. In the light of *GTE Sylvania* and its underlying policies,[7] the focus should be on the vigor of the interbrand competition and the bona fides of the manufacturer's efforts.

The operative legal standard must separate those cases in which a manufacturer acts out of a legitimate concern over the performance of distributors, and thus promotes competition, from cases where its ends are illegitimate. The standard must provide concrete guidance for the fact-finder, and thus preclude speculation based upon often ambiguous evidence. We therefore respectfully suggest that the likelihood a manufacturer's purpose *could* reasonably have been to fix resale prices should be assessed before the jury is permitted to find a per se conspiracy. To that end, we respectfully suggest that the trial judge ought to consider at least the following questions in determining whether a "conspiracy" claim in a complaint-and-termination case ought to be sent to the jury on a per se basis:

---

[7] *GTE Sylvania* teaches that "[i]nterbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law," 433 U.S. at 52 n.19, and "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products," 433 U.S. at 54.

1. Was the manufacturer operating in a market where active interbrand competition exists or was there evidence of general lack of uniformity in the resale prices of a manufacturer's product(s)? *See Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

2. Had the manufacturer put in place a program to improve its overall success in interbrand competition by imposing education, promotion, or service responsibilities on its distributors? *See Davis-Watkins Co. v. Service Merchandise*, 686 F.2d at 1190.

3. Did the manufacturer have a legitimate concern about the plaintiff's failure to satisfy its performance obligations or about other breach of its distribution contract? *Compare Davis-Watkins Co. v. Service Merchandise*, 686 F.2d at 1190, *with Battle v. Lubrizol*, 673 F.2d at 984.

If the answer to each of the foregoing questions is "yes," we respectfully submit that the manufacturer's termination or non-renewal of the plaintiff does not become a per se price-fixing "conspiracy" simply because one or more competing distributors complained to the manufacturer about the plaintiff's pricing. Accordingly, it should not be submitted to the jury on a per se theory.[8] Moreover, such a case should not be sent to the jury at all unless the plaintiff has offered probative evidence of adverse effect in the relevant market. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1388 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 887 (9th Cir. 1982); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982).

---

[8] The foregoing is not intended to be an exhaustive test of when the per se test should be rejected. There may be special circumstances in particular cases which suggest that per se treatment is inappropriate. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

Where there is doubt on one or more of the preceding questions, and hence the case may have to be submitted to the jury, specific interrogatories should be addressed to the jury on the nature of the manufacturer's program and the plaintiff's compliance or non-compliance with it. The jury should be instructed to focus upon whether the manufacturer's concern was to control price for its own sake, independent of the dealer's compliance or non-compliance with its sales, service, or other performance obligations. Only in such a case can a per se verdict even arguably be upheld under this Court's prior decisions.

CONCLUSION

If the appropriate legal standard had been used, the *Monsanto* case could not have been submitted to the jury under a per se instruction. Moreover, the jury instructions on "conspiracy" were impermissibly vague. Accordingly, the Court of Appeals decision should be reversed.

Donald I. Baker
(Counsel of Record)
Robert H. Rawson, Jr.
Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3939

Thomas E. Kauper
University of Michigan Law School
Ann Arbor, Michigan 48109
(313) 764-9341

Attorneys for Amicus Curiae

Of Counsel:

William E. Blasier
General Counsel
Quentin Riegel
Assistant General Counsel
National Association of Manufacturers
1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3847

May, 1983